

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75-6657

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SUPREME COURT, U.S.

ANGELO BARTEMIO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

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The Petitioner, Angelo Bartemio, respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit dismissing an appeal by Petitioner wherein a pretrial motion to dismiss an indictment on, inter alia, double jeopardy grounds was dismissed, absent requested evidentiary hearing by the District Court judge. The Court of Appeals for the Seventh Circuit absent oral argument and on motion of the Government dismissed Bartemio's appeal on April 5, 1976.

OPINION BELOW

The order of the United States Court of Appeals for the Seventh Circuit, dismissing the proceedings below, appear as Appendix "A". This appeal was dismissed on April 5, 1976. On April 13, 1976 Bartemio sought an order from the Court of Appeals for the Seventh Circuit certifying the question herein presented to this court. On April 14, 1976 the motion for certification was denied (Appendix "B").

JURISDICTION

The Judgement of the Court of Appeals for the Seventh Circuit dismissing Petitioner's Appeal was entered on April 5, 1976 (App. "A"). Petitioner's motion to certify the question to this Court was denied on April 14, 1976 (App. "B").

No petition for rehearing was filed. This Petition for Certiorari is filed within thirty (30) days of the date the appeal was dismissed (April 5, 1976). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 19(1)(b) of this Court.

QUESTION PRESENTED FOR REVIEW

"Whether in a federal criminal prosecution an appeal will lie from a pretrial denial of a motion to dismiss an indictment which is based upon, inter alia, grounds of double jeopardy?"

CONSTITUTIONAL PROVISION INVOKED

Fifth Amendment to the United States Constitution:

"No person shall be ... deprived of life, liberty or property, without due process of law...."

STATEMENT OF THE CASE

Petitioner was convicted, after trial by jury, of aiding and abetting the unlawful possession and transfer of stolen stock certificates in violation of 18 U.S.C. §659 and §2. The conviction was on May 1, 1973. Prior to trial Petitioner sought, by pretrial motion, any evidence favorable to him. The Government denied having same. Petitioner appealed his conviction and five (5) year prison term. Both were affirmed, 497 F.2d 927 (unpub. ord., 7th Cir., 1974). Petitioner commenced to serve the sentence in September, 1974. His original petition for certiorari was denied on November 11, 1974, Bartemio v. U.S., 95 S.Ct. 305 (1974).

While serving his sentence he sought a new trial. The District Court denied relief but on appeal the Government confessed error and on March 7, 1975 Petitioner was granted a new trial (unpub. ord., 513 F.2d 634, 7th Cir., 1975). The predicate for the post conviction petition and the subsequent confession of error by the Government related to the suppression of evidence concerning the main or pivotal witness against Bartamio, Maurice Harts.

Subsequently Petitioner learned that the Government had suppressed voluminous materials relative to the possession of the stolen stock certificates which were the subject of his original conviction. The certificates involved in this case were in the possession of a Government informant and were actually validated or stamped by this Government informant long prior to the time petitioner was alleged to have any contact with the same bonds. Petitioner, by pretrial motion, moved to dismiss the indictment on, inter alia, double jeopardy grounds. The Government in nowise denied the existence of extensive reports which indicated that a Government informant had played a major part in making the bonds marketable and, further, the informant's reports as they related to the bonds in question were in possession of the Government even prior to indictment. The District Court denied relief on January 9, 1976 and "took this case off his call" on January 13, 1976 to allow Petitioner to seek review from the order denying any pretrial relief relating to Petitioner's motion to dismiss the indictment.

To make a long story short the underlying fact(s) was quite simple. The bonds in this case were stolen in December, 1970 and petitioner and others were charged with possessing and attempting to sell these bonds in August, 1971. The Government had in their possession reports from an undercover informant

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which related to the theft and validating of these bonds^{1/}. At all times herein pertinent the reports were unknown and unavailable to the petitioner (as was the identity of the informant).

REASONS FOR GRANTING THE WRIT

THE CIRCUIT COURTS OF APPEAL ARE IN TOTAL CONFLICT ON THE QUESTION PRESENTED.

The single question presented is whether a pretrial motion to dismiss an indictment in a federal criminal case is a final appealable order where the motion is based, in part, on grounds of double jeopardy.

The Second Circuit in U.S. v. Beckerman, 516 F.2d 905 (2nd Cir., 1975) affirmed the denial of a pretrial motion to dismiss an indictment after the first trial ended in a mistrial. Inter alia, that court stated:

"...The right will be invaded if an accused, who has properly invoked the Fifth Amendment protection against being twice put in jeopardy, is called upon to suffer the pain of two trials. Green v. United States, 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

If an accused is to be afforded "the full protection of the double jeopardy clause, a final determination of whether jeopardy has attached to the previous trial must, where possible, be determined prior to any retrial." United States v. Lansdown, 460 F.2d 164, 171 (4th Cir., 1972). Contra, Gilmore v. United States, 264 F.2d 44 (5th Cir., 1959) cert. denied, 359 U.S. 994, 79 S.Ct. 1126, 3 L.Ed.2d 982 (1959). The reasoning of the opinion in Lansdown is persuasive here. We conclude that we have jurisdiction to review the denial of the defendant's motion to dismiss the indictment on the predicate of the double jeopardy clause. This is a logical extension of the concept of appealability expressed in Cohen. United States v. Lansdown, supra, 460 F.2d at 170* (516 F.2d at 905, 7).

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^{1/} The undercover Government informant made either daily or bi-weekly reports directly to the F.B.I. and I.R.S. under the code name of "Marco". These reports, according to the Government, deleted any mention of the petitioner albeit the reports incriminated others charged in the indictment. The reports were received by the F.B.I./I.R.S. during the time the events were occurring.

The Third Circuit has found a similar motion to be a final appealable order, U.S. v. DiSilvio, 520 F.2d 247 (3rd Cir., 1975); U.S. ex rel. Webb v. Court of Common Pleas of Philadelphia County, et al., 516 F.2d 1034 (3rd Cir., 1974). The Fourth Circuit has likewise found the pretrial motion to dismiss, where based on grounds of double jeopardy, to be a final appealable order, U.S. v. Lansdown, 460 F.2d 164 (4th Cir., 1972).

The Fifth Circuit seems to be split on the same subject because in U.S. v. Bailey, 512 F.2d 833 (5th Cir., 1975) that court dismissed an appeal by Bailey where he sought to bar retrial after the grant of a mistrial (512 F.2d at 834). However, in U.S. v. Kehoe, et al., 516 F.2d 78 (5th Cir., 1975) the court found contra. To further confuse the Fifth Circuit's position U.S. v. Dinitz, 492 F.2d 53 (5th Cir., 1974); en banc, 504 F.2d 855 (5th Cir., 1974) that court granted relief to Dinitz albeit after conviction as opposed to ruling on a pretrial motion. On further review this Court found that the Fifth Amendment did not bar the retrial of Dinitz where his original trial had been aborted because of the acts and conduct of his retained counsel, U.S. v. Dinitz, ____ U.S.____, 18 Cr.L. 3087, March 8, 1976.

The Seventh Circuit by denying petitioner relief in this case has joined the Fifth Circuit in finding that the pretrial motion to dismiss is not a final appealable order.

In the case at bar we do not have the "classic mistrial". We have a petitioner who was charged in a two (2) count indictment in 1972 and who stood trial, before a jury, in April and May, 1973. That jury acquitted petitioner of an overall conspiracy to possess and transfer stolen bonds (in violation of 18 U.S.C. §371, §659) while the same jury convicted petitioner of aiding and abetting the same offense. What we suggest this realistically means is that the Government's case against this petitioner was "a close case". Our position is that but for the totally suppressed materials this petitioner might well have been totally acquitted. Prosecutorial overreaching conveys the substance of our claim. Had the Government abided by the Brady mandate and produced the report which inculpate others but do

not even mention this petitioner then, it is our position, that this petitioner may well have been totally acquitted. Now, over two (2) years after petitioner's jury trial the suppressed and hidden reports surface^{2/}. Inter alia, these reports indicate that a Government informant actually had possession of these same bonds and provided the validating seal or stamp to make the same bonds marketable. This was well known to the Government prior to indictment, conviction, appeal(s) and an unsuccessful petition for review before this Court (95 S.Ct. 305).

There can be little question that petitioner had:

"A valued right to have his trial completed by a particular tribunal"
(Wade v. Hunter, 336 U.S. 684, 9;
U.S. v. Jorn, 400 U.S. 470, 484-5).

If the above proposition is to be meaningful then this petitioner has forever lost his valued right, e.g., to have the original jury totally pass judgement on his guilt or innocence. In the case at bar that jury was without the ability to pass TOTAL JUDGEMENT ON GUILT OR INNOCENCE DUE TO THE GOVERNMENT'S SUPPRESSION OF MATERIAL EVIDENCE.

This is prosecutorial overreaching which could bar reprocution, Cf., U.S. v. Tateo, 377 U.S. 463 at 468 ft.n.t. 3; U.S. v. Jorn, 400 U.S. 470 at 486, ft.n.t. 12.

The split in Circuits has been amply demonstrated and the Court of Appeals for the Seventh Circuit declined to certify the question presented to this court (App."B").

Petitioner takes the position that in this case he should not have to suffer retrial. In any event petitioner certainly should have been heard in the Court of Appeals; in accord, U.S. v. Beckerman, ante, U.S. v. DiSilvio, ante, and U.S. v. Lansdown, ante.

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^{2/} Petitioner's counsel has yet to view these reports. The substance of the reports are gathered from information received from Government Counsel. These reports have been submitted, in camera, to the Court of Appeals for the Seventh Circuit in connection with an appeal there pending wherein this petitioner's co-indictee, John J. Brennan, has raised a similar claim. This Petitioner requested that the appeals be consolidated, absent success. Oral argument in U.S. v. Brennan, #75-1955, is set for April 27, 1976.

CONCLUSION

Petitioner, Angelo Bartamio, respectfully urges that this court grant his petition for a writ of certiorari and reverse the order from the Court of Appeals for the Seventh Circuit which found that his pretrial motion to dismiss was not a final appealable order; yet further were this court to grant this petition it would be respectfully urged that the Solicitor General be called upon to answer how materials could be suppressed for a time period involving approximately five (5) years during which time petitioner was twice indicted, once tried and convicted and only through a series of appeals was granted retrial on grounds other than those urged in this petition. It must be stressed that at all times herein pertinent the Government was in possession of reports which they declined to make available even to this court during the pendency of Bartamio's earlier unsuccessful petition for review (95 S.Ct. 305).

Respectfully submitted,


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